

1. **1620491 (Migration) [2017] AATA 2730 (6 December 2017)**

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DECISION RECORD

DIVISION: Migration & Refugee Division

CASE NUMBER: 1620491

MEMBER: Hugh Sanderson

DATE: 6 December 2017

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 309 (Spouse (Provisional)) visas:

- Public Interest Criterion 4020 for the purposes of cl.309.225 of Schedule 2 to the Regulations.

Statement made on 06 December 2017 at 8:52am

CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 (Spouse (Provisional)) visa – Provided bogus documents – Psychological harm due to separation

LEGISLATION

Migration Act 1958, s 65

Migration Regulations 1994, Schedule 2, cl 309.225, Schedule 4, PIC4020(1) – PIC4020(5)

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration [in] November 2016 to refuse to grant the applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
5. The applicants applied for the visas [in] December 2014. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.309.225 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate found that the applicant had provided bogus documents in support of the application and did not meet Public Interest Criterion 4020 (PIC 4020).

BACKGROUND

6. The review applicant was born in Afghanistan and is currently [age] years old. He first entered Australia [in] May 2009 as an unlawful maritime arrival. He was granted a Protection visa in September 2009. Since then, he has only travelled out of Australia for a six weeks period commencing [October] 2014.
7. The review applicant married the first named visa applicant (hereinafter "the visa applicant") in 1981. The second named visa applicants are their five youngest children who claim to be [all different ages]. They have [other] children, [details deleted]. They both reside in Australia.
8. In support of the application the applicants submitted their Afghani National Identity Documents (known as a Taskira). The visa applicants also presented Afghani passports which were issued at the Consular-General of the Islamic Republic of Afghanistan in Quetta, Pakistan, [in] 2014.
9. The Department conducted verification checks with the issuing Afghani government authorities as to the validity of the Taskiras provided in support of the application. The verification checks concluded as follows:
 - The Taskira issued for [Visa applicant 1] was not registered and is **fraudulent**;
 - The Taskira issued for [Visa applicant 5] is registered and genuine;
 - The Taskira issued for [Visa applicant 4] is registered and genuine;
 - The Taskira issued for [Visa applicant 3] is not registered and is **fraudulent**;
 - The Taskira issued for [Visa applicant 2] is not registered and is **fraudulent**; and
 - The Taskira issued for [Visa applicant 6] is not registered and is **fraudulent**.
10. The Tribunal wrote to the applicant's agent with this information and invited them to comment on the adverse findings as to the bogus documents. In response, the applicant's agent made the following submissions:
 - The majority of asylum seekers are uneducated and there is no strict understanding of the rule of law among them;

- The importance of documentation in Australia is different to the importance given to official documents in Afghanistan and Pakistan;
 - Applicants seeking refuge from Afghanistan should not be considered as skilled migrants from countries like Nepal and India;
 - Humanitarian applicants should be considered as vulnerable and persecuted people;
 - There were compelling reasons for the visa applicant to produce the documents, particularly as only four of the six documents were found to be bogus;
 - It is inconsistent for the Department to accept similar documents from one country whilst refusing the applications from Afghanistan and Pakistan;
 - The review applicant lives legally in Australia and he is now facing his older days without his family; and
 - It would be against the values of the Australian society if we allowed the review applicant to live in Australia, but not his wife and children.
11. The delegate who considered the application found that the Taskiras provided in support of the application were bogus documents. Accordingly, the delegate found that the applicant did not meet the criteria in PIC 4020(1). The delegate then considered whether the criteria should be waived pursuant to PIC 4020(4). In considering this, the delegate noted the following:
- There was no information which would indicate there were compelling circumstances that affect the interests of Australia;
 - The fact that the parties are in a genuine relationship is the basic requirement for the grant of the visa and as such this would not generally be considered sufficient to waive the PIC 4020(1) requirements; and
 - There was insufficient information of any compassionate or compelling circumstances that affect the interests of an Australian citizen, permanent resident or eligible New Zealand citizen to justify the granting of the visa.
12. The delegate was not satisfied that the criteria in PIC 4020(1) should be waived and accordingly found the visa applicant did not meet the criteria in cl.309.225 and refused the application. As the primary visa applicant did not meet the criteria for the grant of the visa the applications of the second named visa applicants were also refused.

INFORMATION TO THE TRIBUNAL

13. The review applicant provided various medical reports including the following:
- Referral from his general practitioner dated [in] November 2016 noting the review applicant was suffering from severe anxiety and depression exacerbated by the refusal of his family's visas
 - Letters from [a] psychologist, dated [in] April 2017 and [in] December 2017;
 - Patient Discharge Form from [a] Hospital noting the review applicant had been admitted to hospital suffering from [a medical condition] and admitted [in] August 2017 and discharged [in] September 2017; and

- Letter from the applicant's general practitioner dated [in] December 2017 noting the applicant is suffering from [several medical conditions] and that his medical conditions are exacerbated by his social and family isolation.
14. The review applicant appeared before the Tribunal on 5 December 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant and a friend, [Ms A]. The Tribunal hearing was conducted with the assistance of an interpreter in the Hazaragi and English languages.
 15. The review applicant gave evidence as to various aspects of his life in Australia. This included with whom he was currently living, details of his current medical condition and treatment he has been receiving. He gave evidence as to the contact he has with his wife and the difficulties his wife and children currently face in Pakistan. The review applicant appeared genuinely distressed when discussing his separation from his wife and the circumstances she and their children face in Pakistan and the dangers they would face if they returned to Afghanistan for any reason.
 16. [Ms A] gave evidence of the support that she had provided to the review applicant. She confirmed various aspects of the review applicant's health condition and treatment that he has been receiving.
 17. The visa applicant gave evidence of her circumstances in Pakistan and the contact that she has with her husband. She described the various medical conditions the review applicant suffers from and the assistance that she plans to give to him if she were granted the Partner visa.
 18. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

19. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.309.225 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

20. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

21. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
22. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
23. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
24. The documents identified by the Department as being bogus were the Tazkeras of the visa applicant and three of her children. It has not been denied that these documents are not genuine and were not obtained from the appropriate authorities. It was claimed that due to the danger of returning to Afghanistan it was not possible to obtain genuine documents.
25. The Tribunal accepts the information received by the Department from the appropriate Afghani authorities that the Tazkeras received from the visa applicant on three of her children were not registered and are, therefore, not genuine documents. The Tribunal finds that the documents were purported to have been issued by the Afghan authorities in respect of the visa applicant on three of her children but were not. Accordingly, they are bogus documents.
26. The Tribunal accepts the visa applicant and her children would have had difficulty in obtaining the genuine documents if they were required to return to Afghanistan, however, this does not overcome the fact that they had provided bogus documents.
27. The integrity of Australia's immigration system is based on the authorities being able to rely upon documents provided by applicants in support of any application. The fact that an applicant may lack any formal education or that reliance on official documents is not used in their home countries does not absolve an applicant from meeting the requirement that they do not provide bogus documents in support of an application.
28. As the Tribunal has found that the visa applicant provided a bogus document in relation to their application for the Partner visa, the visa applicant does not meet PIC 4020(1).

SHOULD THE REQUIREMENTS OF PIC 4020(1) OR (2) BE WAIVED?

29. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
30. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
31. There is no information before the Tribunal that there are any compelling circumstances that affect the interests of Australia which would justify the granting of the visa.
32. The only family members of the visa applicant who are Australian citizens or permanent residents in Australia are her husband and two of her sons. There is little information as to the circumstances of her sons and no statements have been provided by them that their interests are affected by the refusal of the visa applicant's Partner visa application. The only person for whom it was submitted that was relevant when considering whether there are compassionate or compelling circumstances whose interests are affected is the review applicant, the visa applicant's husband.
33. The review applicant arrived in Australia in May 2009, leaving his wife and family about two months prior to that time. He has returned to Pakistan on only one occasion since then to be able to spend time with his wife and family. He telephones his wife every night to be able to speak to her. At the hearing, the review applicant appeared genuinely distressed at the fact that he had been separated from his wife for over eight years.
34. The review applicant suffers from multiple medical conditions. This includes anxiety and a major depressive illness comorbid with post-traumatic stress disorder. He has been receiving continuing treatment from a psychologist in respect to this condition. The Tribunal accepts the opinion of the review applicant's treating psychologist that the review applicant's psychological and physical condition will significantly improve if his wife and children are granted visas to be able to reside with him in Australia.
35. The review applicant has recently been hospitalised for a period of about a month suffering from [a medical condition]. The only family member in [Australia] who has been able to provide any assistance to the review applicant is his [son]. The Tribunal accepts that the applicant's son is only able to provide limited personal assistance to the review applicant due to his own responsibilities. The Tribunal finds that if the visa applicant is granted the Partner visa that she will be able to provide greater care for the visa applicant which is likely to reduce the severity of his continuing medical conditions and need for treatment.
36. The Tribunal has considered all the circumstances of the review applicant. The Tribunal finds that the review applicant is suffering from great and continuing psychological harm due to his separation from his wife and children. This harm suffered by the review applicant is exacerbated by the conditions his wife and children live in and his concerns for their welfare which causes the review applicant added anxiety. The review applicant is receiving continuing treatment for the anxiety and major depressive illness he suffers from which is likely to continue while he continues to be separated from his wife. His treating professionals believe his condition will improve with the presence of his wife in Australia.

37. In all the circumstances, the Tribunal finds that the situation of the review applicant and the particular circumstances of his relationship with the visa applicant provides compassionate and compelling circumstances that affect him to justify the granting of the visa. Therefore the Tribunal finds the requirements of PIC 4020(1) should be waived.

HAS THE APPLICANT SATISFIED THE IDENTITY REQUIREMENTS?

38. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity.
39. There is no information before the Tribunal that there are any concerns as to the identity of the visa applicant. It is noted that the information the review applicant has provided as to his wife and children have been consistent in previous applications.
40. Therefore, the applicant meets PIC 4020(2A).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY PIC 4020(2A)?

41. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
42. There is no information that the visa applicant nor any member of her family have been refused a visa because of the failure to satisfy PIC 4020(2A).
43. Therefore PIC 4020(2B) is met.

CONCLUSION

44. On the basis of the above, the applicant satisfies PIC 4020 for the purposes of cl.309.225. Accordingly, the application of the applicant should be remitted to the Department for consideration of the other criteria.
45. As the Tribunal has concluded that the visa applicant meets this criterion for the grant of the visa, the applications of the second named visa applicants should now be reconsidered in full.

DECISION

46. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 309 (Spouse (Provisional)) visas:
- Public Interest Criterion 4020 for the purposes of cl.309.225 of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is **false or misleading in a material particular** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...